

Paris bin Ariff & Anor v Wan Ya bin Wan Hussin

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12B-22-02 OF
2016
ZALITA ZAIDAN JC
16 AUGUST 2017

Tort — Road accident — Claim for damages — Accident involving respondent and appellants — Respondent brought action for negligence against appellants and claimed damages — Sessions judge found appellants 80% liable and respondent 20% liable — Sessions judge awarded damages for head injury and partial future loss of earning capacity — Whether damages for head injury excessive — Whether respondent could claim for partial future loss of earning capacity

Tort — Road accident — Liability — Accident involving respondent and appellants — Respondent brought action for negligence against appellants and claimed damages — Sessions judge found appellants 80% liable and respondent 20% liable — Whether sessions judge erred in finding that appellants was 80% liable — Whether respondent contributed negligently to collision

The present action concerned an accident involving a pedestrian ('the respondent') and a motorcycle ridden by the appellants. The respondent claimed that the collision occurred in the middle of the zebra crossing and that the appellants were 50–60 ft away when the respondent crossed the zebra crossing. The investigating officer ('the IO') verified that there was no speed limit signage for the motorcycle lane but only a signage to slow down. The respondent, in his police report, had reported that he looked to his left before crossing and he did not see the appellants. Nevertheless, the respondent testified that he did see the appellants before he was crossing the motorcycle lane. The first appellant on the other hand stated that he saw the respondent and honked at him but the respondent still crossed the motorcycle lane. The sessions court found that the appellants liable at 80% and the respondent at 20%. The court awarded RM90,000 for head injury and RM40,000 for partial future loss of earning capacity. Aggrieved by the decision, the appellants appealed against both liability and quantum. The appellants submitted that the learned sessions judge had erred in finding that the respondent was liable at 20%, seeking for the respondent to be liable at 50%. The appellant further submitted that there was no loss of earning as the respondent was paid by the university during his medical leaves and the award of RM90,000 for head injury was excessive. As against the decision of the learned sessions judge, the

A respondent had filed cross-appeal for medical treatment of RM28,332.95 that was dismissed by the sessions judge.

Held, allowing the appellants' appeal on liability with the apportionment of liability on a 50–50 basis, dismissing appellants' appeal on quantum; and
B dismissing the respondent's cross-appeal in respect of liability and quantum:

(1) Where there is a dispute concerning two differing versions of facts, the court stand to be guided based on the law as stipulated under s 101 of the Evidence Act 1950, where the onus was on the respondent to prove (see
C para 32).

(2) Rules 76, 77 and 78 of the Highway Code ('the Code') do not give the impression that the pedestrian has the 'right of way'. The said three rules emphasise on the safety of the pedestrian where he or she is to check on the safety before crossing whether it is light-controlled zebra crossing or crossing with other pedestrians. To the extent of explaining that the driver may not be able to react in time or to warn the pedestrian, it is for the pedestrian to take heed of the governing law. In the present appeal, the respondent did not conform to r 78 of the Code and was therefore in breach of the same which was a prima facie evidence of negligence on the respondent's part (see paras 33–34).
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(3) There was no evidence by the respondent to strengthen its argument that the appellants were 'reasonably far away (at least a few seconds away)' except for the two versions of facts that the appellants were 50–60 ft away from the respondent and the appellants' facts that the respondent was 20 ft away, prior to the collision. Based on the marked accident as 'X' on the short zebra crossing, it was most probable that the appellants were 20 ft away from the respondent which means that the respondent crossed the motorcycle lane even upon seeing the appellants which was consistent with respondent's own admission that he did see the appellants before crossing the motorcycle lane. Being 20 ft away, it would be impossible for the appellants to apply its motorcycle brakes in time to avoid the respondent. The respondent failed to use reasonable care for the safety of himself and therefore contributed negligently to the collision. The Code was for road users and pedestrians to adhere to and therefore both parties were liable (see paras 36–37).
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(4) Although the brain injury could not be measured by damages accurately to justify the injury however the court was guided by the medical evidence and the Revised Compendium of Personal Injury Awards. In the latter, the range of award for brain injury was between RM104,500 to RM264,500. The award for the respondent's head injury made by the learned session judge at the amount RM90,000 was reasonable considering the surrounding factors, for instance his age at the time of
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accident and his current occupation as a senior lecturer. The court also allowed for the partial future loss of earning capacity as pleaded (see para 40).

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- (5) In relation to the medical expenses of RM28,332.95 which the respondent's insurer had paid, the respondent could not be found to incur any expenses with respect to the medical expenses made by the insurance company (see para 41).

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[Bahasa Malaysia summary]

Tindakan ini berkaitan kemalangan yang melibatkan pejalan kaki ('responden') dan motosikal yang ditunggang oleh perayu-perayu. Responden mendakwa bahawa pelanggaran berlaku di bahagian tengah lintasan zebra dan bahawa perayu-perayu berada sejauh 50–60 kaki apabila responden melintas lintasan zebra tersebut. Pegawai penyiasat ('IO') mengesahkan bahawa tidak terdapat tanda had laju untuk lorong motosikal tetapi hanya tanda untuk bergerak perlahan. Responden, dalam laporan polisnya, telah melaporkan bahawa dia melihat ke kiri sebelum melintas dan dia tidak nampak perayu-perayu. Walau bagaimanapun, responden memberi keterangan bahawa dia tidak nampak perayu-perayu sebelum dia melintas lorong motosikal tersebut. Perayu pertama sebaliknya menyatakan bahawa dia nampak responden dan membunyikan hon tetapi responden masih melintas lorong motosikal tersebut. Mahkamah sesyen mendapati perayu-perayu bertanggungjawab sebanyak 80% dan responden sebanyak 20%. Mahkamah mengawardkan RM90,000 bagi kecederaan kepala dan RM40,000 untuk sebahagian kapasiti kehilangan pendapatan masa hadapan. Tidak puas hati dengan keputusan tersebut, perayu-perayu merayu terhadap kedua-dua liabiliti dan kuantum. Perayu-perayu berhujah bahawa hakim sesyen yang bijaksana telah tersilap dalam mendapati bahawa responden adalah bertanggungjawab sebanyak 20%, memohon untuk responden menjadi bertanggungjawab sebanyak 50%. Perayu selanjutnya berhujah bahawa tidak terdapat kehilangan pendapatan kerana responden dibayar oleh universiti semasa cuti sakitnya dan award sebanyak RM90,000 untuk kecederaan kepala adalah berlebihan. Terhadap keputusan hakim sesyen yang bijaksana, responden telah memfailkan rayuan balas bagi rawatan perubatan sebanyak RM28,332.95 yang ditolak oleh hakim sesyen.

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Diputuskan, membenarkan rayuan perayu-perayu atas liabiliti dengan pembahagian liabiliti atas asas 50–50, menolak rayuan perayu-perayu atas kuantum; dan menolak rayuan balas responden berkenaan liabiliti dan kuantum:

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- (1) Di mana terdapat pertikaian berkaitan dua versi fakta yang berbeza, pendirian mahkamah untuk dibimbing berdasarkan undang-undang seperti yang ditetapkan di bawah s 101 Akta Keterangan 1950, di mana

- A beban adalah ke atas responden untuk membuktikan (lihat perenggan 32).
- (2) Peraturan-peraturan 76, 77 dan 78 Kod Lebu Raya ('Kod') tidak memberi tanggapan bahawa pejalan kaki mempunyai 'right of way'.
- B Peraturan-peraturan tersebut menekankan ke atas keselamatan pejalan kaki di mana dia perlu memeriksa keselamatan sebelum melintas sama ada ia adalah lintasan zebra dengan lampu isyarat yang dikawal oleh pejalan kaki atau melintas dengan pejalan-pejalan kaki yang lain. Setakat menjelaskan bahawa pemandu mungkin tidak dapat bertindak balas dengan cepat atau untuk memberi amaran kepada pejalan kaki, ia adalah untuk pejalan kaki mengambil perhatian terhadap undang-undang yang mengawal. Dalam rayuan ini, responden tidak mematuhi peraturan 78 Kod dan oleh itu melanggarnya yang mana adalah keterangan prima facie oleh pihak responden (lihat perenggan 33–34).
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- D (3) Tidak terdapat keterangan oleh responden untuk memperkukuhkan hujahannya bahawa perayu-perayu adalah 'reasonably far away (at least a few seconds away)' kecuali bagi kedua-dua versi fakta bahawa perayu-perayu sejauh 50–60 kaki daripada responden dan fakta
- E perayu-perayu bahawa responden adalah sejauh 20 kaki, sebelum pelanggaran. Berdasarkan ke atas kemalangan yang ditanda sebagai 'X' atas lintas zebra yang pendek tersebut, ia adalah berkemungkinan perayu-perayu adalah sejauh 20 kaki daripada responden yang bermaksud bahawa responden melintas lorong motosikal walaupun
- F melihat perayu-perayu yang mana adalah konsisten dengan pengakuan responden sendiri bahawa dia memang nampak perayu-perayu sebelum melintas lorong motosikal tersebut. Berada sejauh 20 kaki, adalah tidak mungkin bagi perayu-perayu untuk menekan brek motosikalnya dengan cepat untuk mengelak responden. Responden gagal untuk menggunakan
- G kewajipan berhati-hati bagi keselamatan dirinya dan oleh itu menyumbang secara cuai kepada pelanggaran tersebut. Kod tersebut adalah untuk pengguna jalan raya dan pejalan-pejalan kaki untuk mematuhi dan oleh itu kedua-dua pihak adalah bertanggungjawab (lihat perenggan 36–37).
- H (4) Walaupun kecederaan otak tidak dapat diukur dengan ganti rugi secara tepat untuk menjustifikasikan kecederaan tersebut walau bagaimanapun mahkamah dibimbing oleh keterangan perubatan dan Revised Compendium of Personal Injury Awards. Dalam Revised Compendium of Personal Injury Awards julat award untuk kecederaan otak adalah di
- I antara RM104,500 sehingga RM264,500. Award untuk kecederaan kepala responden yang dibuat oleh hakim sesyen yang bijaksana pada jumlah RM90,000 adalah munasabah mempertimbangkan faktor-faktor sekeliling, seperti umurnya pada masa kemalangan dan pekerjaannya sebagai pensyarah kanan. Mahkamah juga membenarkan bagi

sebahagian kapasiti kehilangan pendapatan masa hadapan seperti yang dihidangkan (lihat perenggan 40).

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- (5) Berkenaan perbelanjaan perubatan sebanyak RM28,332.95 yang mana syarikat insurans responden telah bayar, responden tidak boleh didapati untuk menanggung apa-apa perbelanjaan berkaitan kepada perbelanjaan perubatan yang dibuat oleh syarikat insurans (lihat perenggan 41).]

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Notes

For cases on claim for damages, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2388–2389.

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For cases on liability, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2390–2392.

Cases referred to

Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601, HL (refd)

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De Cotta v Tan Hock Lee [1972] 2 MLJ 173; [1972] 1 MLRA 94, CA (refd)

Foong Nan v Sagadevan [1971] 2 MLJ 24, FC (refd)

Govinda Raju & Anor v Laws [1966] 1 MLJ 188 (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

Kek Kee Leng v Teresa Bong Nguk Chin & Anor [1978] 1 MLJ 61; [1977] 1 MLRA 321, FC (refd)

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Khairul Sham bin Ahmad & Anor v Yesudass a/l Michaelsamy [2005] 2 MLJ 679; [2005] 2 CLJ 195, HC (refd)

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650; [2013] 1 LNS 1, CA (refd)

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Lai Yew Seong v Chan Kim Sang [1987] 1 MLJ 403; [1986] 1 MLRA 245, SC (refd)

Lay Hong Food Corporation Sdn Bhd v Tiong Nam Logistics Solutions Sdn Bhd [2017] MLJU 718; [2017] 1 LNS 708, CA (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)

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Lim Chor Ching & Ors v Idris Abdul Karim & another appeal [1998] MLJU 666; [1998] 3 CLJ Supp 145, HC (refd)

Mohamed Salleh bin Awang & Anor v Low Han Leong & Anor [1982] 1 MLJ 82; [1981] 1 MLRA 306, FC (refd)

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Mohd Radzi bin Othman v Sasitharan a/l Arjuna [2013] 1 PIR 261 (refd)

Nooriant bte Zainol Abidin & Ors v Tang Lei Nge [1990] 2 MLJ 242, HC (refd)

Ong Cheng Wah & Anor v Supramaniam a/l Arjunan [2001] MLJU 291; [2001] 4 CLJ 202, HC (folld)

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Parry v Cleaver [1969] 1 All ER 555, HL (refd)

Sathisvaran a/l Chandrasegaran v Agilan a/l Vanmugelan & Anor [2012] 4 MLJ 548; [2012] 3 CLJ 450, CA (refd)

- A *Shah Firul Azad bin Jaiman v Tham Kim Hong* [2015] 1 PIR (59) (refd)
Soo Kwee Meng v Tenaga Nasional Berhad [2013] 2 PIR 553 (refd)
Yap Yew Yee v Subramaniam & Anor [1972] 2 MLJ 53; [1972] 1 MLRH 325 (refd)

B **Legislation referred to**

Civil Law Act 1956 s 28(i)(a)
Evidence Act 1950 ss 101, 102, 103
Highway Code rr 76, 77, 78, Part IV
Road Transport Act 1987 ss 63(1), 68, 68(3), 79(2)

- C *RK Nathan (Vinod Nathan with him) (Kalai & Partners) for the appellant.*
Justin Morais (Justin Morais & Co) for the respondent.

D **Zalita Zaidan JC:**

INTRODUCTION

- E [1] The appellants who are the defendants are appealing against the decision of the sessions judge made on 28 January 2016 after a full trial on the issue of liability and quantum.

- F [2] There is also a cross-appeal by the respondent who is the plaintiff for the medical treatment of RM28,332.95 that was dismissed by the sessions judge on 28 January 2016.

- G [3] The parties, in this judgment, will be known as they were in the sessions court. The term ‘the defendants’ and ‘the first defendant’ may at times be used interchangeably.

G **FACTS**

- H [4] There was an accident involving a pedestrian who is the plaintiff and a motorcycle ridden by the defendants where two different versions were pleaded. The sessions judge had narrated the full facts of the case in her written judgment (at p 3 of the additional appeal record No 2 and the police reports at pp 128–129 of the appeal record). For ease of reference I will reproduce the two versions:

I **Versi Plaintiff**

Plaintiff memplid bahawa pada jam lebih kurang 8.15 pagi pada 19 Jun 2013 ketika telah turun dari bas di perhentian bas di KM 9.5 Lebuhraya Persekutuan (Klang – KL) dan selepas menoleh ke kiri dan pastikan tiada motorsikal, plaintiff bergerak melintas di lintasan *Zebra* lorong motorsikal, tiba-tiba sebuah motorsikal No BLQ 5032 yang ditunggang oleh defendan pertama datang dengan laju dari sebelah kiri

dan tanpa memberi apa-apa amaran atau isyarat terlebih dahulu terus melanggar plaintif di atas *zebra crossing* lorong motorsikal tersebut. A

Versi Defendan

Defendan melaporkan semasa defendan sedang menunggang motorsikalnya pada 19 Jun 2013 jam lebih kurang 8.30 pagi berhampiran KM 9.5, laluan motorsikal Lebuhraya Persekutuan, apabila tiba di laluan motorsikal KM 9.5 defendan menyedari ada seorang pejalan kaki yang berjalan di kanan laluan tersebut dan defendan membunyikan hon kerana pada ketika itu laluan tersebut ada banyak motorsikal. Tiba-tiba pejalan kaki tersebut iaitu plaintif melintas laluan motorsikal itu. Defendan tidak sempat mengelak dan juga tidak sempat untuk membrek lalu melanggar plaintif. B C

[5] The investigating officer ('IO') verified the accident happened on 19 June 2013 and had went to the accident site on the same day at 1915hrs (7.15pm) and the next day at 1730hrs (5.30pm). The IO also sketched and found that the defendants were coming from 'bottom to top' based on the sketch plan (at p 130 of the appeal record) and the plaintiff was on the left side of the motorcycle lane, crossing from left to right. It was reported that there was no barrier to the view, the weather was a good weather and the road surface before the zebra crossing is flat. The IO's investigation is that the plaintiff has the right of way and the defendants should give way to a pedestrian on a zebra crossing. The IO's investigation had found the defendants guilty under s 79(2) of the Road Transport Act 1987 and was fined for not following the road traffic signage and the fine had been paid by the first defendant. The IO said that the plaintiff was late in making the report, a delay of two months as the plaintiff was hospitalised and was still in pain and could not move only until 16 August 2013 and verified that the plaintiff came with the wheelchair to make the police report. D E F

THE SESSIONS COURT'S DECISION G

[6] The sessions judge explained in her judgment as to her findings which can be found at pp 6–28 of the additional appeal record No 2. The liability issue was apportioned where the session judge found for the defendants liable at 80% and the plaintiff at 20%. An extraction of the sessions judge's finding is referred at paras 1.4–1.13 of the learned session judge: H

1.4 Keterangan plaintif ini bahawa kemalangan berlaku di 'zebra crossing' yang ditanda 'X' juga disokong oleh kedudukan tangga ke arah UITM iaitu tangga tersebut betul-betul berada di hadapan lintasan 'zebra' seperti kelihatan di gambar (ms 9, 'C') dan di rajah kasar ('T') di ms 63 'B'. I

1.5 Kenyataan bahawa plaintif telah dilanggar di 'zebra crossing' ini juga telah disokong oleh laporan polis plaintif (P9).

- A 1.6 Oleh yang demikian, dari kenyataan di atas mahkamah mendapati dan berpuas hati bahawa tiada percanggahan langsung di antara pliding dan keterangan saksi-saksi pihak plaintif juga keterangan plaintif sendiri bahawa tempat berlaku pelanggaran adalah di atas *zebra crossing*.
- B 1.7 Di samping itu juga mahkamah mendapati bahawa tempat pelanggaran adalah di 'zebra crossing' ini sebagaimana dikatakan oleh plaintif adalah konsisten dan disokong oleh laporan polis plaintif dan keterangan pegawai penyiasat juga, rajah kasar yang menunjukkan kedudukan perhentian bas, lintasan *zebra* dan tangga ke UITM yang juga kelihatan di gambar (ms 59, Ikatan C).
- C 1.8 Mahkamah juga mendapati bahawa selain daripada keterangan plaintif yang konsisten dengan laporan polisnya, plaintif adalah seorang saksi yang boleh dipercayai dan tandaan tempat kemalangan 'X' adalah boleh dipercayai dan logik kerana plaintif sudah menggunakan laluan *zebra* itu untuk menyeberang sejak tahun 1988 lagi dan plaintif sememangnya amat biasa dan peka dengan keadaan jalan dan persekitaran tempat kemalangan.
- D 1.9 Ini juga disokong bahawa berdasarkan r 78 of the Highway Code — 'Step on the pedestrian's crossing only if oncoming traffic is reasonable far away', iaitu berdasarkan r 78 ini, plaintif adalah berhak melintas di lintasan *zebra* walaupun ia melihat/menyedari keujudan motorsikal defendan sekiranya motorsikal defendan 'reasonably far away', tandaan 'D' oleh plaintif di rajah kasar tentang kedudukan motorsikal defendan kali pertama di lihatnya menunjukkan motorsikal itu 'reasonably far away'.
- E 1.10 Juga mahkamah mendapati bahawa tuduhan/aligasi atau cadangan pihak defendan bahawa plaintif sebenarnya berada di tempat yang telah ditanda 'Z' adalah tidak *probable*. Secara logiknya kenapa pula plaintif melalui atau mengambil jalan itu kerana ianya adalah lebih jauh dari tangga yang plaintif perlu ambil untuk naik ke UITM dari perhentian bas yang plaintif diberhentikan ('E') adalah 10 kaki di hadapan lintasan 'ZEBRA'.
- F 1.11 Oleh itu dari hujahan-hujahan di atas, mahkamah berpuas hati bahawa defendan telah cuai kerana telah melanggar plaintif di lintasan 'zebra' iaitu di tempat yang ditanda 'X' di rajah kasar dan bukan di 'Z' sebagaimana dikatakan oleh pihak defendan. Defendan pertama juga telah gagal mematuhi ss 19, 23, 25 dan 83 Kod Lebuhraya.
- G 1.12 Fakta bahawa defendan telah disaman sebagaimana telah diakui oleh SD1 sendiri dalam pemeriksaan balas juga menyokong keputusan mahkamah ini. Juga hasil siasatan polis melalui pegawai penyiasat yang telah menyiasat kes ini telah membuktikan bahawa defendan adalah cuai dalam pemanduan motorsikalnya lalu melanggar plaintif lalu mengakibatkan kemalangan ini berlaku.
- H 1.13 Keputusan ini juga turut disokong oleh keterangan plaintif bahawa plaintif yang berada di atas lintasan 'zebra' telah diletakkan dalam keadaan 'Agony of the moment' dengan tindakan defendan yang membawa motorsikalnya dengan laju dan dengan tidak berhati-hati walaupun terdapat papan tanda 'kurangkan laju' dan papan tanda gambar pejalan kaki melintas 'lintasan zebra' di kedua-dua belah laluan motorsikal tersebut (ms 57–59, 'E'), juga dengan terdapatnya 'speed breakers' (garisan kuning) dengan cat getah khas (ms 27, 'C') bagi memastikan motorsikal mengurangkan kelajuan di atas lorong motorsikal itu.
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[7] In relation to quantum, the medical reports from both submissions were referred by the session judge whom had meted out the injuries and the award (at pp 10–28 of the additional appeal record No 2).

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THE DEFENDANT’S SUBMISSION

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[8] Learned counsel for the defendant advanced several grounds for appeal in its memorandum of appeal submitting that the sessions judge did not give proper judicial evaluation on the facts and law and had failed to assess the evidence. The defendants’ counsel submitted that the sessions judge was erred in finding the plaintiff liable at 20%, seeking for the plaintiff to be liable at 50%. The defendants’ counsel averred that the agony of the moment pleaded by the plaintiff (based on the pleadings amended statement of claim at p 13 and p 20e of the appeal record), that he had looked at his left before crossing the zebra crossing and had crossed the motorcycle lane when suddenly the defendants were speeding on the motorcycle lane (evidence given at p 268 of the appeal record) could not be relied upon. The defendants’ counsel pointed out the discrepancies by the plaintiff where the plaintiff testified that he only saw the defendants for the first time when he was in the middle of the zebra crossing submitting the distance of the defendants being 50–60 ft away. The defendants counsel submitted that it was impossible for the plaintiff to be in the agony of the moment as claimed when the plaintiff himself stated that he will ensure the lane was safe:

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pastikan keadaan selamat dan tiada motorsikal baru saya melangkah untuk melintas

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But based on his testimony (at p 66 of the additional appeal record) the plaintiff said that he saw the motorcycle coming and he crossed the motorcycle lane:

GR: 50-60 kaki

Ok, you saw the motorcycle coming and you cross at the motorcycle lane here.

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SP3: Yes

The defendants’ counsel highlighted the police report made by the defendants where the first defendant stated that he had honked at the plaintiff but the plaintiff still crossed the motorcycle lane (at p 128 of the appeal record).

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[9] The defendants’ counsel submitted that the zebra crossing as at p 230 of the appeal record is a short motorcycle lane and the sketch plan as found at p 130 of the appeal record had magnified the motorcycle lane with the zebra crossing (photos of motorcycle lane at pp 131–132 of the appeal record). In reference to the IO’s evidence (at pp 263–266 of the appeal record), it was stated that the plaintiff saw the defendants when he was in the middle of the zebra crossing to which the defendants’ counsel contended relying on the plaintiff’s own admission (at pp 66–67 of the appeal record (No 2)) that the

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A plaintiff crossed the zebra crossing even after seeing the defendants, emphasising that the plaintiff walked while crossing and did not run.

[10] The defendants' counsel also referred to r 76 (Part IV Pedestrian) of the Highway Code other than r 78 which stated:

B At a light-controlled pedestrian's crossing, practice the safety first rule — wait for the traffic to actually come to a standstill before crossing.

C and submitted that in light-controlled pedestrian's crossing pedestrians must practice safety what more in the case of zebra crossing where there is no light-control. The defendants' counsel submitted that the plaintiff was negligent, pointed out that the plaintiff breached the Highway Code, relied on the case of *Ong Cheng Wah & Anor v Supramaniam all Arjunan* [2001] MLJU 291; [2001] 4 CLJ 202.

D [11] The defendants' counsel highlighted this court that the plaintiff made many discrepancies in his statements during the cross-examination and re-examination session and from his police report where in the latter, he reported that he had ensured there was no motorcycle before he crossed the motorcycle lane but testified that he saw the defendants before crossing and later stated that he forgot what he had said (at pp 69 and 77 of the appeal record No 2). The defendants counsel relied on a number of cases as at pp 13–14 of the defendants' counsel's written submission.

F [12] The defendants' counsel highlighted this court that there was no witnesses to testify that the accident actually occurred on the middle of the zebra crossing as claimed by the plaintiff. It was also submitted that the police's summon issued against the defendants cannot be used as an evidence against the defendants.

G [13] The defendants' counsel submitted that the defendants' version was that he was 20 ft from the plaintiff whom was the only one crossing the zebra crossing as corroborated in his evidence at pp 94–95 of the appeal record No 2 where the defendants could not apply the motorcycle brakes in time and there was no evidence by the plaintiff that he tried to avoid the collision, relying on the authority of *Govinda Raju & Anor v Laws* [1966] 1 MLJ 188 quoting Raja Azlan Shah:

H To my mind, when a plaintiff is perplexed, or agitated when exposed to danger by the wrongful act of the defendant, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of him in the circumstances. ...

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The defendants' counsel also submitted that the sessions judge failed to appreciate the fact in applying a vehicle's brakes where it can only happened at 75 ft referring to the braking tests tables of *Bingham's Motor Claims* cases as

referred in the case of *De Cotta v Tan Hock Lee* [1972] 2 MLJ 173; [1972] 1 MLRA 94 (CA, Singapore) and *Yap Yew Yee v Subramaniam & Anor* [1972] 2 MLJ 53; [1972] 1 MLRH 325. In reliance of the braking system, the defendants counsel also submitted other cases, *Mohamed Salleh bin Awang & Anor v Low Han Leong & Anor* [1982] 1 MLJ 82; [1981] 1 MLRA 306 and *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61; [1977] 1 MLRA 321 (FC, Kuching).

[14] In relation to the quantum, the defendants' counsel submitted at the hearing that the appeal on quantum will be narrowed down to brain injury award and partial future loss of earning capacity. The defendants' counsel contended that the award for brain injury was excessive and should be scaled down to RM50,000–RM60,000 in reference to the cases decided by the sessions court in the cases of *Soo Kwee Meng v Tenaga Nasional Berhad* [2013] 2 PIR 553 where the defendants' counsel submitted that the plaintiff only suffered mild head injury and short term memory impairment which is mild. In another case, *Mohd Radzi bin Othman v Sasitharan a/l Arjuna* [2013] 1 PIR 261 the plaintiff suffered many residuals due to head injury and was awarded RM100,000 and in the case of *Shah Firul Azad bin Jaiman v Tham Kim Hong* [2015] 1 PIR (59), the plaintiff having many residuals was awarded RM40,000 for head injury.

[15] Pertaining to partial of future loss of earning capacity, the defendants' counsel argued that there was no loss of earning as it was not pleaded by the plaintiff but the session judge awarded RM40,000 as partial future loss of earning capacity to the plaintiff. The defendants' counsel argued that the plaintiff was paid by the university during his medical leave of ten months, that the plaintiff is back at work at the same university and after the accident the plaintiff was given a salary increment and therefore the plaintiff did not suffer any loss of earnings and relied on a number of authorities which had held that for loss of earnings capacity, there should only be raised if there was a substantial or real and not merely a fanciful risk that the plaintiff would lose his present employment before the end of his working life.

THE PLAINTIFF'S SUBMISSION

[16] Learned counsel for the plaintiff submitted that the accident occurred on the zebra crossing, particular at the marked 'X', in the middle of the zebra crossing. The IO verified that the accident occurred on the zebra crossing and was walking towards the staircase into UITM where the plaintiff work. It was submitted that this evidence is also supported by the evidence of the plaintiff's statement that he first saw the defendants when he was on the middle of the zebra crossing. The plaintiff also added as a supporting evidence the fact that the staircase leading to UITM is right in front of the zebra crossing.

A [17] The plaintiff's evidence is consistent with the IO that the accident occurred in the middle of the zebra crossing and the sketch showing the position of the bus stop, zebra crossing and the staircase leading towards UITM. The plaintiff had been using the zebra crossing since 1988 and is aware of the surroundings. The sessions court judge found that the plaintiff's evidence and testimony is reliable. The sessions court judge also relied on the r 78 of the Highway Code — 'Step on the pedestrian crossing only if oncoming traffic is reasonable far away' where the plaintiff marked the position of the defendant's motorcycle was 'reasonably far away'.

C [18] The plaintiff's counsel emphasised that the collision occurred on the middle of the zebra crossing which places the plaintiff the 'agony of the moment' where the defendants were negligent for speeding and the sessions judge was right in deciding based on the balance of probabilities that the defendants were found liable at 80% and the plaintiff should not be held contributed negligent which is submitted at the cross-appeal ground below.

E [19] On the issue of quantum, the plaintiff's counsel argued that the award of RM90,000 was not excessive as it involves brain injury and the accident had affected the plaintiff's current occupation.

CROSS-APPEAL

The plaintiff's submission

F [20] The plaintiff's counsel submitted its ground for appeal for liability and quantum. In relation to liability, the plaintiff's counsel submitted that the defendants ought to be 100% liable. The plaintiff's counsel emphasised that the defendants had been fined under the Road Transport Act 1987 which proves to show that the defendants were liable and relied on the independent witness's statement, the IO whom had testified:

H Hasil siasatan Wan Ya Bin Wan Hussin yang melintas di Lintasan Zebra mempunyai hak laluan utama, motorsikal (Defendan) BLQ 5032 mesti memberi laluan kepada pejalan kaki di Lintasan Zebra, tambahan pula, kerana terdapat Tanda Pejalan Kaki Melintas di Lintasan Zebra serta Tanda Kurangkan Laju sebelum Lintasan Zebra tersebut.

I [21] The argument that the collision in the middle of the zebra crossing places the plaintiff the 'agony of the moment' relying on the case of *Foong Nan v Sagadevan* [1971] 2 MLJ 24 that the plaintiff's unable to avoid the collision should not be held blameworthy of the accident.

[22] The plaintiff's counsel reiterate on the award for brain injury by submitting that the brain injury is with bilateral occipito-parietal subdural

haemorrhage and multiple intracranial bleed resulting in permanent residual disabilities and therefore the award is rather low and relied on a number of authorities in the range of RM140,000–RM150,000 where in one High Court decision, *Mohd Fauzi bin Desa lwn Ahmad Farid bin Azahar* in 2009 retained the award of the sessions court at RM140,000.

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[23] On the issue of the medical bills paid under the plaintiff's insurance policy which was not awarded by the session judge, whom only awarded for the medical bills paid by the plaintiff the amount RM22,5556.23, the plaintiff's counsel relied on the s 28(i)(a) of the Civil Law Act 1956.

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The defendants' submission

[24] On the issue of liability, the defendants' counsel reiterate the arguments and ground put forward and also stand by its written submission.

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[25] On the issue of the medical bills paid under the plaintiff's insurance policy, the defendants' counsel argued that the plaintiff should not be awarded for medical treatment costing RM28,332.95 where the plaintiff's insurer had paid the amount of RM28,332.95. For the plaintiff's medical treatment which the plaintiff paid himself the amount of RM22,556.23 is recoverable and can be awarded. The defendants' counsel relied on the case of *Sathisvaran all Chandrasegaran v Agilan all Vanmugelan & Anor* [2012] 4 MLJ 548; [2012] 3 CLJ 450 that where the medical expenses had been paid by the insurer, the plaintiff is not entitled to claim for it. Since the plaintiff did not pay the medical expenses, he incurred no expenses with respect to the medical expenses. Another case referred is *Khairul Sham bin Ahmad & Anor v Yesudass all Michaelsamy* [2005] 2 MLJ 679; [2005] 2 CLJ 195:

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Therefore, it is a clear principle that the purpose of damages is to put an injured party to the same position has had the tort not been committed, and recovery of damages is definitely not a mechanism for enriching the injured party ... I think special damages means and out-of-pocket expenses and which consists of money incurred or paid by the plaintiff, which amounts to a loss to the plaintiff ... He did not pay the bill himself ... Therefore he has no right to be compensated for the said bill. The plaintiff is refrained from claiming more than what he has lost.

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[26] The defendants' counsel submitted that this authority is also supported by the English case of *Parry v Cleaver* [1969] 1 All ER 555:

... an injured person should receive such an amount of money as will put him in the same position as he would have been in if he had not received the injuries ...

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Since the plaintiff did not pay for the medical expenses of RM28,332.95, he incurred no expenses with respect to the medical expenses made by the

- A insurance company and the defendants submitted that the plaintiff is only entitled to claim for RM22,556.23 that is for his out-of-pocket expenses.

APPEAL

- B [27] This is my judgment for the defendants' appeal in respect of liability and quantum and on the plaintiff's cross-appeal on liability and quantum. I am mindful that there was a full trial and based on a number of great authorities, an appellate court should but rarely interfere with the conclusion arrived at by the judge who has had the advantage of hearing the witnesses unless it is
- C satisfied that the judge has acted on a wrong principle of law or has made a wholly erroneous estimate of damage suffered, either due to an omission to consider relevant materials or admitting irrelevant considerations: *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1. In any event, this court is of the view that it is its duty
- D to interfere with the findings of fact to prevent a miscarriage of justice upon review of the evidence where the sessions court had the advantage of hearing the witnesses and obtaining an impression of their veracity from their demeanour.

- E [28] The initial onus of proving the case is always on the plaintiff. The plaintiff, at the start of the plaintiff's case, has the legal burden of proving the existence of any relevant fact and the evidential burden of the existence of such fact. The law on the burden of proof can be found in a plethora of cases and the
- F decision of the Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 had extensively discussed the burden of proof based on ss 101 to 103 of the Evidence Act 1950 and made reference to one earlier Federal Court case of
- G *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86.

- H [29] Based on the *Letchumanan Chettiar Alagappan @ L Allagappan's* case, s 101 is the burden to establish the case which rests throughout on the party who asserts the affirmative of the issue while the 'burden of proof' in s 102 of the Evidence Act 1950 is the burden to adduce evidence, to rebut the claim in order to discharge the burden of proof. The Federal Court judge Salleh Abbas in the *International Times's* case stated that:

- I The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

[30] Following s 101 of the Evidence Act 1950, the onus is on the plaintiff to prove that he is not liable in this case, that he crossed the motorcycle lane on the zebra crossing when he had ensured that it was safe to cross and it was the defendants who were liable. I now turn to the law where the Highway Code provides the law for pedestrians under Part IV of the Highway Code (LN 165/1959). Rule 78 of the Highway Code spells out the law:

Step on the pedestrian's crossing only if oncoming traffic is reasonably far away (at least a few seconds away). The driver may not be able to react in time, or warn you if he is unable to stop in time, eg failed brakes, etc.

The Highway Code is enacted based on s 68 of the Road Transport Act 1987 which stated that the highway code can be relied on by any party to the proceedings, be it criminal or civil: s 68(3) of the Road Transport Act 1987.

[31] Reverting to the facts as pleaded by the plaintiff, it was claimed that the collision occurred in the middle of the zebra crossing and that the defendants were 50–60 ft away when the plaintiff crossed the zebra crossing. The IO had verified that there was no speed limit signage for the motorcycle lane but only a signage to slow down. The plaintiff had reported that he looked to his left before crossing and did not see the defendants. However, the plaintiff testified that he did see the defendants before he was crossing the motorcycle lane. The defendants on the other hand stated that he saw the plaintiff and honked at him but the plaintiff still crossed the motorcycle lane.

[32] Where there is a dispute concerning two different versions of facts, I stand to be guided based on the law as stipulated under s 101 of the Evidence Act 1950, where the onus is on the plaintiff to prove. The sessions judge may have approached the two different versions by considering which version is 'inherently probable or improbable': *Noorianti bt Zainol Abidin & Ors v Tang Lei Nge* [1990] 2 MLJ 242 at p 243. However, I viewed that one should not restrict one's choice two versions only as the law is crystal clear and should be applied on the facts with the evidence read together with the testimony of the witnesses: *Lim Chor Ching & Ors v Idris Abdul Karim & another appeal* [1998] MLJU 666; [1998] 3 CLJ Supp 145.

[33] Rule 78 of the Highway Code provides the law for pedestrians crossing the zebra crossing and reading rr 76, 77 and 78 of the Highway Code, I viewed that they do not give the impression that the pedestrian has the 'right of way'. The said three rules emphasise on the safety of the pedestrian where he or she is to check on the safety before crossing whether it is light-controlled zebra crossing or crossing with other pedestrians. To the extent of explaining that the driver may not be able to react in time or to warn the pedestrian, it is for the pedestrian to take heed of the governing law and I rely on the case attributed by the defendants' counsel, the case of *Ong Cheng Wah & Anor v Supramaniam all*

A *Arjunan* [2001] MLJU 291; [2001] 4 CLJ 202.

B [34] Following *Ong Cheng Wah* case, it was held that any breach of the provisions of the Highway Code which is directly relevant to the facts of the case is prima facie evidence of negligence under s 63(1) of the Road Transport Act 1987. In this instant appeal, the plaintiff did not conform to r 78 of the Highway Code and was therefore in breach of r 78 of the Highway Code which is a prima facie evidence of negligence on the plaintiff's part.

C [35] In addition, in applying the law to the facts of the instant appeal, I too find that there is inconsistency in plaintiff's version as to how the collision occurred. It was the plaintiff's assertion that the collision was in the middle of the zebra crossing and prior to that the defendants were 50–60 ft away. The silent evidence of the photos of the motorcycle lane (at pp 131, 132, 228, 229 and 230 of the appeal record), where it is not a big road, it is for one motorcycle to pass through and is a 'one-way' lane, I find that the zebra crossing motorcycle lane is a short one. Based on the photos at pp 229–230 of the appeal record, one may take two to three steps the most to cross to the other side and I have doubt in my mind as to whether the defendants were actually 50–60 ft away, surely the plaintiff could have crossed without getting hit. In another logical perspective, the plaintiff would not have crossed the motorcycle lane upon seeing the defendants, period.

F [36] There was no witness to support the plaintiff's evidence. The plaintiff had testified by making differing statements which could not affirm as to how the collision actually took place and could not prove the 'agony of the moment'. There was no evidence by the plaintiff to strengthen its argument that the defendants were 'reasonably far away (at least a few seconds away)' except for the two versions of facts that the defendants were 50–60 ft away from the plaintiff and the defendants' facts that the plaintiff was 20 ft away, prior to the collision. Based on the marked accident as 'X' on the short zebra crossing, it is most probable that the defendants were 20 ft away from the plaintiff which means that the plaintiff crossed the motorcycle lane even upon seeing the defendants which is consistent with plaintiff's own admission that he did see the defendants before crossing the motorcycle lane. This court viewed that being 20 ft away, it would be impossible for the defendants to apply its motorcycle brakes in time to avoid the plaintiff.

I [37] I viewed that the plaintiff failed to use reasonable care for the safety of himself and therefore contributed negligently to the collision. As submitted by the defendants counsel's case of *Lai Yew Seong v Chan Kim Sang* [1987] 1 MLJ 403; [1986] 1 MLRA 245, a Supreme Court decision, the test of contributory of negligence is based entirely on the conduct of the plaintiff. In that case, it involved an accident of two motorcars were the issue of the distance between

the two and where one suddenly stopped without giving an indication, decided that the trial judge failed to take that matter into account and his failure had materially affected the appellant's case and defence against the allegations of the respondent that he was negligent at the time of the accident. It is the view of this court that the Highway Code is for road users and pedestrians to adhere to and therefore both parties are liable.

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[38] In relation to the quantum or damages, before this court can interfere, it should be satisfied that the trial judge had acted on the wrong principle of law or misapprehended the facts, or has made a wholly erroneous estimate of the damage: *Lay Hong Food Corporation Sdn Bhd v Tiong Nam Logistics Solutions Sdn Bhd* [2017] MLJU 718; [2017] 1 LNS 708 at para 37 referred to the English case of *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at p 617.

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[39] The sessions court had relied on the medical reports by Hospital TAR, Klang, medical report of Sri Kota Specialist Medical Centre and neuro specialist of plaintiff, Professor Dr Vickneswaran and specialist neuro of the defendants', Associate Professor Dr Hari Chandran. The plaintiff's neuro specialist verified that the brain injury resulted plaintiff to have permanent residual disabilities. This was also stated in the medical reports tendered by the defendants', Associate Professor Dr Hari Chandran that the plaintiff is suffering from permanent residual disabilities for example, memory impairment, poor concentration and personality changes and that 'he will not be able to perform in his present occupation at present occupation at the injury level ...'.

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[40] This court viewed that although the brain injury could not be measured by damages accurately to justify the injury however the court is guided by the medical evidence and the revised compendium of personal injury awards. In the latter, the range of award for brain injury is between RM104,500–RM264,500 for brain injury. I viewed that the award for the plaintiff's head injury made by the learned sessions judge at the amount RM90,000 is reasonable considering the surrounding factors taken into account for instance his age at the time of accident and his current occupation as a senior lecturer. I also allow for the partial future loss of earning capacity as pleaded.

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[41] In relation to the medical expenses of RM28,332.95 which the plaintiff's insurer had paid, the plaintiff could not be found to incur any expenses with respect to the medical expenses made by the insurance company. Therefore the cross-appeal for this RM28,332.95 must fail.

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- A** [42] In light of the above reasons, the defendants' appeal on liability is allowed with the apportionment of liability on a 50–50 basis. The appeal for the award for the brain injury award as decided by the sessions judge of RM90,000 and the award of RM40,000 for partial future loss of earning capacity be retained and the appeal is dismissed. The cross-appeal of the
- B** plaintiff in respect of liability and quantum is dismissed.

Appellants' appeal on liability allowed with apportionment of liability on 50–50 basis; appellants' appeal on quantum dismissed; respondent's cross-appeal in respect of liability and quantum dismissed.

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Reported by Dzulkarnain Ab Fatar

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